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U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Delta Homes, Inc.

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Serial No. 75/043,190

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Charles C. Gervy, Jr. and Seth M. Nehrbass of Pravel Hewitt  
Kimball & Krieger for Delta Homes, Inc.

Thomas W. Wellington, Trademark Examining Attorney, Law  
Office 104 (Sidney Moskowitz, Managing Attorney).

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Before Cissel, Wendel and Bucher, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Applicant, Delta Homes, Inc., a Mississippi  
corporation, has filed an application for registration of  
the mark "DELTA" for "manufactured housing, namely, mobile  
family homes with kitchen, bedrooms, and living rooms."<sup>1</sup>

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<sup>1</sup> Serial No. 75/043,190, in International Class 19, filed  
January 11, 1996, alleging use since October 1, 1995.

The Trademark Examining Attorney issued a final refusal to register based upon Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, "DELTA" when used on these mobile homes, so resembles the registered mark, "DELTA STEEL BUILDING COMPANY, DALLAS, TEXAS," as shown below, as applied to "prefabricated steel buildings," as to be likely to cause confusion, or to cause mistake, or to deceive.<sup>2</sup>



The Trademark Examining Attorney also issued a final refusal to register based upon applicant's failure to comply with the requirement for new specimens.

Applicant has appealed the final refusals to register. Briefs have been filed, but applicant did not request an oral hearing. We affirm the Trademark Examining Attorney on both of the refusals to register.

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<sup>2</sup> Registration No.712,382, issued on March 14, 1961. The registration sets forth dates of first use of February 6, 1960; §8 affidavit accepted and §15 affidavit filed; renewed.

Likelihood of confusion

In the course of rendering this decision on likelihood of confusion, we have followed the guidance of In re E.I. DuPont DeNemours & Co., 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973), which sets forth the factors which, if relevant, should be considered in determining likelihood of confusion.

Applicant seeks registration for DELTA in typed form. As seen from the special form drawing reproduced above, registrant's mark is a composite mark, presenting the word DELTA in prominent fashion above the words "STEEL BUILDING COMPANY" and "DALLAS, TEXAS." All this is contained within an irregular, hexagon-shaped border. Although the respective marks must be viewed in their entirety, the overall commercial impression one takes away from this composite is the word DELTA. The word DELTA is the most dominant portion of this mark because of its relatively large size within the composite. Further, as applied to prefabricated steel buildings, the word DELTA is arbitrary while all the other words in the composite have a descriptive significance. And DELTA is the single most likely way one would verbalize this composite mark. As a

result, we find the marks to be similar as to sound, meaning and overall commercial impression.

Applicant sells manufactured housing, also known as "mobile homes" or "house trailers." As the amended identification of goods makes clear, each unit of this manufactured housing has a kitchen, bedrooms, and common living areas. Applicant argues that the primary markets for these goods are individuals or families.

Registrant's goods are listed as "prefabricated steel buildings." Applicant argues these goods are not at all closely related to the mobile homes sold by applicant. While applicant contends that registrant's buildings are large square-footage buildings directed to the commercial sector, there is no such limitation in the registration. Accordingly, it is reasonable to presume that these buildings might well include smaller, non-commercial structures, such as utility sheds, carports or even metal structures that provide a second roof over the existing roof of a mobile home. Such prefabricated structures may be inherently complementary to applicant's mobile homes. If these latter items were sold under similar marks, consumers would logically assume the goods emanated from the same source.

There is nothing in the record undercutting the Trademark Examining Attorney's contention that applicant's mobile homes may have a thin metal coating (e.g., aluminum, steel, or some composite material) not unlike the steel walls integral to registrant's prefabricated buildings.

It is also conceivable that these respective goods could actually be competing products in certain settings requiring basic structures to be erected immediately -- for example, on a construction site or as temporary quarters for a small, rudimentary office.

Furthermore, the record in the file shows three firms having valid and subsisting registrations with goods in only two different international classes - mobile homes in Int. Cl. 12 (in the "vehicle class") and prefabricated buildings in Int. Cl. 19 (non-metallic building materials).<sup>3</sup> The three third-party registrations made of record by the Trademark Examining Attorney, as evidence of the asserted

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<sup>3</sup> It appears as if non-metal prefabricated buildings are correctly classified in Int. Cl. 19, but that registrant's prefabricated buildings of metal would be more correctly classified in Int. Cl. 6 ("Metal Goods" including "transportable building of metal"). In any case, this distinction under the Nice Classification system affects neither registrant's rights under this registration nor our determination in the instant case. Whatever their material composition, such prefabricated, transportable buildings are not designed to be transported independently on the highway as vehicles - e.g., having their own axles, wheels, etc. -- as are the mobile homes in Int. Cl. 12.

relatedness of the goods involved herein, indicate that three different entities have registered their marks both for goods of the type listed in applicant's application and for goods of the type recited in registrant's registration. Third-party registrations which individually list two different items and which are based on use in commerce are evidence that the listed goods are of a type which may emanate from a single source. In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993); In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467 (TTAB 1988) at note 6.

In examining the conditions surrounding their sale, we find that neither of these items would be considered inexpensive or impulse purchases. However, the identification-of-goods clause does not restrict the relevant buying class to professional buyers. Where the buyers consists of both professional buyers and ordinary consumers, the standard of care to be exercised by the reasonably prudent purchaser will be considered to be equal to that of the least sophisticated consumer in the class. Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277, at 293, 18 USPQ2d 1417, 1430 (3<sup>rd</sup> Cir.), cert. denied, 112 S. Ct. 373 (Sup. Ct. 1991). See also 3 McCarthy on Trademarks and Unfair Competition, §23.98 at 23-191 (4th

ed. 1997). Hence, the correct standard for all the goods discussed herein must be that of the ordinary consumer.

For all the above reasons, we find a likelihood of confusion between applicant's mark and that of registrant.

#### Alleged abandonment by registrant

Applicant takes the position that these goods are not related. Additionally, as a result of its investigation during the prosecution of this application, applicant now argues that neither registrant nor any of its possible transferees are still in business, resulting in the conclusion that registrant has clearly abandoned this mark. However, inasmuch as the cited mark is still the subject of a valid and subsisting registration, this *ex parte* prosecution will not be suspended in anticipation of applicant's filing a cancellation petition at some point in the future, as applicant states it will do.

#### Requirement for Substitute Specimens

Applicant argues that the photographs depicting advertising signs submitted as specimens are in the nature

of displays associated with the goods offered for sale. Clearly the signs, with the words "DELTA HOMES, Inc., A Division of Belmont Homes, Inc." display the trademark sought to be registered ("DELTA") in a prominent manner, as seen in the reproduction below:



However, these photographs *qua* specimens depict roadside signs of the type that might be used in a rural area by a real estate owner or developer. Behind the signs -- informational billboards that could just as well announce the plans for a soon-to-be-developed sub-division -- sits a large, undeveloped track of land without a single mobile home anywhere in sight.

Presumably signs of this exact type might well be used at the roadside entrance to a commercial lot devoted to the sale of mobile homes. Even in that case, however,



specimens picturing a mobile home sales park (or at the least, one mobile home) in the same camera frame as the sign may have been necessary to meet the requirements for a *service mark* specimen under the Trademark Rules. That is, it is unlikely a photograph of an empty lot would be sufficient even if applicant were applying for a service mark for retail mobile home dealership services.<sup>4</sup> In any event, the types of specimens acceptable for trademark specimens (i.e., evidencing the use of the mark on goods, as in the instant case), are generally less varied than is the case with service mark specimens, and the photograph submitted is clearly not unacceptable in the instant *trademark* application.

For a trademark application under §1(a) of the Trademark Act, specimens are required to evidence use of the mark on or in connection with the goods in commerce. Trademark Rule 2.56 states, in part:

The specimens shall be duplicates of the labels, tags, or containers bearing the trademark, or the displays associated with the goods and bearing the trademark (or if the nature of the goods makes use of such specimens impracticable then on

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<sup>4</sup> If the same informational matter show on this outdoor sign had instead been submitted, for example, as a print advertisement for retail mobile home dealership services, it would likely still be unacceptable service mark usage absent a drawing (or picture) of a mobile home, or if in some other way the services were more clearly indicated thereon. See TMEP §1301.04.

documents associated with the goods or their sale)....

37 C.F.R. §2.56.

Reflecting the definition of "use in commerce" in §45 of the Trademark Act, 15 U.S.C. §1127, the parenthetical notation in this rule does permit applicant to submit alternatives such as documents associated with the goods or their sale as specimens where the goods are such that placement of the mark on the goods, containers, tags, labels or displays associated with the goods is impracticable. However, applicant has neither submitted a document nor argued that this is a situation in which the nature of the goods makes use on tags, labels or displays associated with the goods impracticable. As is the case with auto dealerships placing their names on auto trunk lids or tail gates, presumably the mobile home industry practice includes the attachment of small metal name tags (e.g., by rivet, screw, glue, etc.) to the sides or ends of the mobile homes.

For this reason, we affirm the requirement of the Trademark Examining Attorney for replacement specimens as well.

Decision: We affirm the Trademark Examining Attorney as to his finding of likelihood of confusion and his requirement for substitute specimens. Registration is hereby refused.

R. F. Cissel

H. R. Wendel

D. E. Bucher

Administrative Trademark  
Judges, Trademark Trial and  
Appeal Board